DOCKETING STATEMENT-AGENCY

Caption of Case **4CCA Docket No. (If Known)** ***17-2307***

NATIONAL LABOR RELATIONS BOARD

v.

ANTHONY AND ASSOCIATES, INC.

Type of Action

✓ Application for Enforcement
___ Petition for Review
___ Cross Petition

Name of Agency **NATIONAL LABOR RELATIONS BOARD**
Administrative Law Judge _____
Agency Number **05-CA-153220**
Statute or other authority establishing jurisdiction in the Court of Appeals **29 U.S.C. § 160(e)**

A. Timeliness
1. Date of entry of order **September 29, 2017**
2. Time allowed for review or enforcement_____
Authority_____

B. Finality
1. Tribunal or board issuing order or regulation **National Labor Relations Board**
2. Is the order or judgment appealed from a final decision on the merits? yes [✓] no [ ]
3. If no, is the order appealed from a collateral or interlocutory order reviewable under any exception to the finality rule? yes [ ] no [✓]
If yes, explain

C. If INS case, is petitioner subject to deportation while this petition is pending?
yes [ ] no [ ]
If yes, do you intend to file a motion to stay deportation?
yes [ ] no [ ]

D. Has this case been before the Court previously?
yes [ ] no [✓]
If yes, give case name, docket number, and disposition of each prior appeal on a separate sheet.

E. Is there any case now pending or about to be brought before this Court, any other court or administrative agency, or the Supreme Court which either arises from the same case or controversy or involves substantially related issues?
yes [ ] no [✓]

If yes, cite the case and manner in which it is related on a separate sheet. If abeyance, consolidation, or in seriatim argument is warranted, counsel must file a separate motion seeking such relief.

If related case is pending in this Court, has it been accepted for mediation by the Office of the Circuit Mediator?

yes [ ] no [ ]

F. State the nature of the proceeding, the relief sought, and the outcome below. Attach additional page if necessary. **On September 14, 2016, this Court entered an order in No. 16-1919 enforcing the Board's initial order in this case. Subsequently, the Region 5 Director issued a compliance specification and a hearing was held before Administrative Law Judge Arthur J. Amchan. The judge issued a decision on August 18, 2017, fixing the amount the amount of backpay due under the Board's initial Order. On August 18, 2017, the Board issued an order transferring the proceeding to the Board and notifying the Respondent that the Board must receive exceptions to the ALJ decision by September 15, 2017. Respondent did not file exceptions. On September 29, 2017, in the absence of any response, the Board issued a decision and order adopting the Administrative Law Judge's findings and conclusions.**

G. Issues to be raised on petition or application. Attach additional page if necessary.
Respondent did not file exceptions to the ALJ decision with the Board. Having preserved no objections, the Board is now entitled to summary entry of a judgment enforcing its order.

H. Is settlement being discussed? yes [ ] no [✓]

I. Is expedited disposition of this case necessary? yes [ ] no [✓]

If yes, you must file an appropriate motion.
Is oral argument necessary? yes [ ] no [ ]

J. List each adverse party to this action. Attach additional sheets if necessary. If no attorney, give address and telephone number of the adverse party.

Adverse party **Anthony & Associates, Inc.**
Attorney **Mark L. Keenan, Esq., Nelson Mullins Riley & Scarborough LLP**
Address **Atlantic Station, 201 17th St. N.W., Ste. 1700, Atlanta, GA 30363**
Telephone **Tel: (404) 322-6111 Email: mark.keenan@nelsonmullins.com**

K. Petitioner's or Applicant's Name **National Labor Relations Board**
Address **1015 Half Street S.E, Washington D.C. 20570**
Telephone **202 273-2960**

L. Attorney or pro se litigant filing this docketing statement. Will you be handling the appeal?
yes[✓] no[ ]
Name **Linda Dreeben**
Attorney [✓] Pro Se [ ]
Firm **National Labor Relations Board**
Address **1015 Half Street S.E, Washington D.C. 20570**
Telephone **(202) 273-2960**

If this is a joint statement by multiple petitioners or applicants, add the names and addresses of other petitioners or applicants and their counsel on an additional sheet, accompanied by a certification that all petitioners or applicants concur in this filing.

Signature s/ Linda Dreeben

Date **11/08/2017**

EACH COPY OF THE DOCKETING STATEMENT SERVED OR FILED SHALL HAVE ATTACHED TO IT COPIES OF:

(1) THE APPLICATION FOR ENFORCEMENT, OR PETITION FOR REVIEW;
(2) THE DOCKET SHEET OF THE AGENCY FROM WHICH THE APPEAL IS TAKEN;
(3) THE JUDGMENT OR ORDER SOUGHT TO BE REVIEWED AND ANY OPINION OR FINDING;
(4) ANY OPINION, FINDINGS, OR RECOMMENDATION OF AN ADMINISTRATIVE LAW JUDGE UNDERLYING THE ORDER AT ISSUE;
(5) ANY TRANSCRIPT ORDER (WITH ATTACHMENTS, IF ANY); AND
(6) A CERTIFICATE OF SERVICE FOR THIS DOCKETING STATEMENT.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	:	
	:	No.
Petitioner	:	
	:	
v.	:	Board Case No.:
	:	05-CA-153220
ANTHONY AND ASSOCIATES, INC.	:	
	:	
Respondent	:	

APPLICATION FOR SUMMARY ENTRY OF A JUDGMENT
ENFORCING A SUPPLEMENTAL ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Fourth Circuit:

The National Labor Relations Board (the "Board"), pursuant to Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(e)), applies to this Court for summary entry of a judgment enforcing its Supplemental Order against Anthony and Associates, Inc. (Respondent). The Board is entitled to summary enforcement of its Supplemental Order because Respondent failed to file with the Board exceptions to the administrative law judge's decision. In support, the Board shows:

A. Jurisdiction of this Court

This Court has jurisdiction over this application under Section 10(e) of the Act (29 U.S.C. § 160(e)). Venue is proper in this Circuit because the unfair labor

practices occurred in Maryland. The Board's final order issued on September 29, 2017.

B. Proceedings Before the Board

1. The underlying violations were brought before the Court by the Board's application for enforcement of its June 30, 2016, Decision and Order. That order directed Respondent Anthony and Associates, Inc., in part, to make whole a certain employee for any loss of earnings and benefits suffered by reason of the discrimination against her. The Court entered its judgment and mandate enforcing the Board's Order in full in No. 16-1919 on September 14, 2016.

2. A controversy having arisen over the amount of backpay due under the terms of the Board's order, the Regional Director issued a compliance specification and amended compliance specification alleging the amount of backpay due under the Board's Order.

3. Following a supplemental proceeding before Administrative Law Judge Michael A. Rosas, the judge issued a decision on August 18, 2017, fixing the amount the amount of backpay due under the Board's initial Order.

4. On August 18, 2017, the Board issued an order transferring the proceeding to the Board and notifying Respondent that the Board must receive exceptions to the administrative law judge's decision by September 15, 2017.

5. Section 10(c) of the Act (29 U.S.C. § 160(c)) provides that "if no

exceptions are filed [with the Board] within twenty days after service [of the administrative law judge's decision] upon the parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed." Section 102.46 and 102.48 of the Board's Rules and Regulations (29 C.F.R. 102.46 and 102.48) implement this provision and provide that, in the event no exceptions are filed within 28 days, the decision of the administrative law judge shall be adopted by the Board and all objections and exceptions thereto are waived for all purposes.

6. Respondent did not file exceptions with the Board.

7. In the absence of any exceptions to the administrative law judge's decision, on September 29, 2017, the Board issued an order adopting the Administrative Law Judge's findings and conclusions, and directing Respondent to take the action set forth in the recommended Supplemental Order of the Administrative Law Judge.

C. The Board Is Entitled to Summary Enforcement of Its Order

The Board is entitled to summary entry of a judgment enforcing its order because, by failing to file exceptions with the Board challenging the administrative law judge's decision, the Respondent failed to raise any issues before the Board. Section 10(e) of the Act (29 U.S.C. § 160(e)) provides that "no objection that has not been urged before the Board . . . shall be considered by the court, unless the

failure or neglect to urge such objection shall be excused by extraordinary circumstances." This limitation is jurisdictional and its application is mandatory. *Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 666-67 (1982). Interpreting this requirement, this Court and other circuits have consistently held that a respondent's failure to file any exceptions before the Board entitles the Board, absent extraordinary circumstances, to summary entry of a judgment enforcing its order. *NLRB v. Pugh & Barr, Inc.*, 194 F.2d 217, 218-21 (4th Cir. 1952). *Accord, e.g., NLRB v. Tri-State Warehouse & Distrib.*, 677 F.2d 31, 31 (6th Cir. 1982); *NLRB v. Int'l Union of Operating Eng'rs, Local 86,* 357 F.2d 841, 846-47 (3d Cir. 1966). No extraordinary circumstances are present here.

WHEREFORE, the Board respectfully requests that the Court take jurisdiction of the proceedings, serve notice of the filing of this application upon Respondent, and enter judgment summarily enforcing the Board's order in full. A proposed judgment is attached.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, S.E.
Washington, D.C. 20570
(202) 273-2960

Dated in Washington, D.C.
this 8th day of November, 2017

Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ANTHONY & ASSOCIATES, INC.

and Case: 05-CA-153220

PHYLLIS A. HEMPHILL

SUPPLEMENTAL ORDER

A controversy having arisen over the amount of backpay due the discriminatee under the terms of the Order[1] issued by the National Labor Relations Board on June 30, 2016, and enforced by the United States Court of Appeals for the Fourth Circuit, the Regional Director for Region 5, on February 16, 2017, issued a Compliance Specification and Notice of Hearing. Pursuant thereto, a hearing was held before Administrative Law Judge Michael A. Rosas.

Thereafter, on August 18, 2017, the Administrative Law Judge Michael A. Rosas issued his Supplemental Decision and, on the same date, the proceeding was transferred to and, continued before the Board in Washington, D.C. The Administrative Law Judge determined the amount of backpay due the discriminatee, and recommended that the Respondent pay such amount.

No statement of exceptions having been filed with the Board, and the time allowed for such filing having expired,

Pursuant to Section 10(c) of the National Labor Relations Act, as amended and Section 102.48 of the National Labor Relations Board Rules and Regulations, the Board adopts the findings and conclusions of the Administrative Law Judge as contained in his Supplemental Decision, and orders that the Respondent, Anthony & Associates, Inc., its officers, agents,

[1] The unpublished Order adopted the April 13, 2016 decision of the Administrative Law Judge.

successors, and assigns, shall pay the amount set forth in the recommended Order of the Administrative Law Judge.

Dated, Washington, D.C., September 29, 2017.

By direction of the Board:

/s/ Farah Z. Qureshi

Associate Executive Secretary

JD−66−17
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ANTHONY & ASSOCIATES, INC.

and Case 5-CA-153220

PHYLLIS A. HEMPHILL
An Individual

Paul Veneziano, Esq., for the General Counsel
Mark L. Keenan, Esq. (Nelson Mullins Riley & Scarborough LLP), Atlanta, GA, for the Respondent

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This compliance case, tried in Washington, D.C. on May 16-17 and June 7-9, 2017, follows the unlawful termination of Phyllis Hemphill in violation of Section 8(a)(1) of the National Labor Relations Act (the Act)[1] by Anthony & Associates, Inc. (the Respondent) on February 18, 2015. In his Decision, dated April 13, 2016, adopted by the National Labor Relations Board (the Board) on June 30, 2016, and enforced by the United States Court of Appeals for the Fourth Circuit, Administrative Law Judge Arthur Amchan determined that the Respondent unlawfully terminated Hemphill in retaliation for complaints relating to her job reclassification and hourly pay at Walter Reed National Military Medical Center (Walter Reed). As a remedy, he ordered the Respondent to reinstate Hemphill to her former position and make her whole for her consequential financial losses.

The second compliance specification alleges that the Respondent failed to reinstate Hemphill and make her whole for any loss or earnings and other benefits resulting from her unlawful discharge. The specification recognizes, however, that reinstatement is no longer possible because the Respondent's Walter Reed contract expired on May 31, 2015[2] and it no longer operates any work sites in the Washington, D.C. metropolitan area to which Hemphill could be reinstated. Accordingly, the relief sought is solely limited to backpay.

The Respondent denies that backpay is owed on several grounds. The first defense is premised on the assertion that Hemphill's misconduct during her removal from the workplace on February 18 disqualified her from the right to reinstatement, as well as the right to backpay. The second defense contends that the Respondent's backpay liability ended on May 31, the day that the Respondent's Walter Reed contract work ended. Lastly, the Respondent alleges that

[1] 29 USC §§ 151–169.
[2] All dates refer to 2015 unless otherwise specified.

Hemphill willfully failed to mitigate her damages on August 10, when she accepted and then declined suitable interim employment.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. THE UNFAIR LABOR PRACTICE DECISION

In his Decision, Judge Amchan concluded that Hemphill engaged in protected concerted activity by "protesting the Respondent's reclassification of her job and others and lowering the wage rate she and others had received from prior contractors. Her protest was clearly concerted, as it was done in conjunction with Joel Chung and others. Hemphill's February 9 email was part of the protest she initiated in October 2013." He further concluded that the Respondent unlawfully discharged Hemphill because she engaged in such conduct and rejected the "Respondent's reliance [on] Hemphill's alleged misuse of her government computer [as] pretextual, and as . . . further evidence of discriminatory motive. . . . conjured up by Respondent between February 11 and 18." Judge Amchan also found that the Respondent decided to terminate Hemphill on February 10, "before any of Respondent's agents discussed removal with any government official." Finally, he rejected the contention that any "government employee requested that Hemphill either be terminated or removed from the Walter Reed contract."[4]

Judge Amchan's Order required the Respondent, in pertinent part, to offer Hemphill full reinstatement to her former job as a credentialing assistant at Walter Reed National Military Medical Center (Walter Reed) or a substantially equivalent position and to make her whole for any loss of earnings and other benefits suffered as a result of her unlawful discharge.

II. THE SECOND AMENDED COMPLIANCE SPECIFICATION

The second amended compliance specification's calculations of Heather Keough, the Region's compliance officer, cover the period of February 18 through September 13, 2016, the date Hemphill obtained new employment. The calculations include $74,971.68 in backpay, $13,056.96 in fringe benefits, $1,016.40 for paid time off due, $151.21 for job search expenses, and $6,175 for excess tax liability due to a lump sum payment. The total net backpay claimed is $95,371.25. The calculations are based on the following: Hemphill's hours of work based on a full-time schedule; an hourly wage rate of $18.15 and health and welfare benefits of $4.02 while employed by the Respondent; the hourly wage rates paid for Hemphill's medical credentialing position by the Respondent's first successor contractor – $25.29 per hour in wages and $4.02 in

[3] The General Counsel's unopposed motion to correct the transcript, dated August 7, 2017, is granted and received in evidence as GC Exh. 104.

[4] Judge Amchan gave no weight to a purported email from Walter Reed employee Ariel Lingat stating that "We will terminate Ms. Hemphill today" as vague, unclear and of dubious authenticity because it was an email chain that was out of chronological order and introduced by the Respondent only after Lingat testified and, thus, not subjected to examination about the document. (R. Exh. 38.)

health and welfare benefits; the hourly wage rates paid for Hemphill's medical credentialing position by the second successor contractor – $20.18 in wages and $7.43 in fringe benefits; the additional payroll taxes payable due a lump sum award; and 56 hours of unpaid time off after Hemphill's termination.[5]

III. The Successor Contracts

The Respondent's Walter Reed contract expired on May 31. On June 1, its medical credentialing operations were assumed by LLM Placements (LLM). Consistent with the requirement in Executive Order 13495, "Nondisplacement of Qualified Workers Under Service Contracts,"[6] that LLM, as successor contractor, afford the right of first refusal to its predecessor's employees, LLM offered employment to all of the Respondent's employees. With the exception of Carolyn Howard, who was out on medical leave, LLM offered employment to all of the Respondent's employees and most accepted employment. Rehired credentials coordinators were paid $25.29 per hour, plus $4.02 per hour in health and welfare payments.[7]

On May 31, 2016, LLM's Walter Reed contract expired. On June 1, 2016, LLM's credentialing operations were assumed by Paramount Solutions and Global Services (Paramount). Once again, all employees on LLM's payroll were offered continued employment at Walter Reed. Most of LLM's credentialing employees accepted Paramount's offers of employment and were paid $20.18 per hour, plus fringe benefits of $7.43.[8]

IV. Hemphill's Conduct After She Was Discharged

In preparation for Hemphill's discharge and removal from Walter Reed on February 18, Nicole Young, the Respondent's Director of Human Resources, emailed Jeffrey Fennewald, the manager overseeing the credentialing department, and James Walker, the contracting representative. They were informed that the Respondent planned to remove Hemphill that day. At Fennewald's request, Kafi Odu, the Respondent's project manager, arranged for security officers to be present in case of an outburst by Hemphill. Upon arriving at Walter Reed that

[5] The compliance officer's methodology was largely undisputed and her analysis was credible. However, it is evident that the Region instructed her to calculate backpay for the entire period subsequent to Hemphill's discharge, including instances where she failed to mitigate her damages.

[6] EO 13495 was signed by President Barak Obama on January 30, 2009 and effectively applied to all new federal contract solicitations on or after January 18, 2013.

[7] The testimony of Linda Malloy, LLM's chief operating officer was credible, undisputed and corroborated by personnel rosters (Tr. 81, 101-102, 109; GC Exh. 9-10, 80-81, 83-84, 100-102.) Walter Reed employees James Walker and Jeffrey Fennewald testified that they could input as to whether a contractor should retain a particular employee of its predecessor, but there is no credible evidence that they made recommendations relating to employees hired by LLM or its successor, Paramount. Fennewald emailed Nicole Young a few days *before* the contract expired to request that the *Respondent* remove Howard, then out on medical leave, from the employee roster that was being forwarded to LLM due to Howard's deficient performance. In contrast, the law of the case, as determined by Judge Amchan, established that Walter Reed officials never requested Hemphill's termination.

[8] The testimony of Jacqueline Wilson, Paramount's president, was also credible, undisputed and corroborated by the personnel rosters (Tr. 242-247, 251-253, 262; GC Exh. 85, 90-91.)

morning, Young met with Fennewald, Odu and base security in preparation for Hemphill's removal from her workplace on the 3rd floor of the facility.

Hemphill was leaving her office at lunch time with Howard and Rachel Brackett, a Walter Reed employee, when she was intercepted by Odu. He asked her to accompany him to a brief meeting, Hemphill complied and they proceeded to a conference room where Young was waiting. The room was located next to the elevators outside of the main work areas. Brackett and Howard remained in the hallway waiting for Hemphill.

After Hemphill was brought to the conference room, Young asked her to take a seat. Hemphill replied that she did not have to speak with Young. After informing Hemphill she was being terminated, including the basis for the action, Young attempted to hand her a termination letter. Hemphill refused to accept it. Young then directed Hemphill to gather her belongings from her desk and refrain from speaking with anyone as she left the building. Hemphill became indignant, replying that Young could not tell her who she could speak with.

Base security was present at the time Hemphill left the conference room. Ignoring warnings by the security officers to be quiet, Hemphill announced loudly that she was terminated as she proceeded into the work area that preceded the medical credentialing work area. The security officers told her to wait for them, but she ignored their warnings as she arrived at her work area and attempted to speak with coworkers. As coworkers and Walter Reed personnel looked on from their cubicles and offices, the security officers caught up to Hemphill and handcuffed her. Hemphill began to cry, accused the officers of police brutality and yelled out to Fennewald, who was standing outside his office, to help her.

Hemphill continued yelling as Young and Odu collected her belongings. Still handcuffed, she was then escorted by Young and the security officers onto the elevator. As the elevator descended, Hemphill remained indignant, telling Young not to touch her coat. She added that she had contacted the federal government about the Respondent. Once outside the building, the security officers instructed Hemphill to hand over her facility access card. Since Hemphill was handcuffed, however, one of the officers reached into her pocket and pulled out the access card. An officer then removed the handcuffs and handed over her belongings. In all, it took approximately one to two minutes to remove Hemphill from the facility.[9]

Shortly after the incident, James Walker, the supervisory management analyst for Walter Reed's Healthcare Service Contracts Division, requested a report of the incident, which Young and Odu provided. Walker had no further involvement with Hemphill until the Respondent, facing unlawful labor practices, sent him the following request:

> Good afternoon, Mr. Walker,
>
> I am sending this query to you as the Supervisory Management Analyst/COR for the contract AAI was performing at WRNMMC to provide administrative support services.

[9] As explained in greater detail at fn. 12, infra, Hemphill was not a very credible witness. As such, I credit the divergent testimony of Nicole Young and Fennewald over that of Hemphill and her close friend Brackett.

As you well know, AAI is no longer the contractor on-site at WRNMMC. Our contract for services expired May 30, 2015. During our contract performance, there was a termination of a contract employee by the name of Phyllis Hemphill, that worked in Medical Credentialing at the time. Ms. Hemphill was terminated on February 19, 2015 by AAI.

AAI is trying to find solutions to resolve a complaint Ms. Hemphill has filed and would like to know if your office would be willing to voluntarily participate in our attempt to find solutions to resolve her complaint. The hospital's participation would be strictly voluntary as there is no legal basis requiring participation by your office in a resolution of this complaint. AAI is making this attempt to resolve this complaint in order to bring this matter to closure without the need of further legal proceedings requiring participation by AAI and/or your office.

Without being the current contractor of record, AAI is unable to reinstate or re-hire Ms. Hemphill at WRNMMC. We fully understand that a contract would have to be in place with a contractor in order to legally provide administrative support services and/or obligate the government to pay for such services. To be clear, AAI is not requesting any such deviation from government rules, policies or regulations. We are simply examining all realms of possibilities in order to resolve and bring closure to this matter. We are not requesting to be re-issued a contract award to perform any services.

Having said that, AAI would like to know whether your office would be willing to voluntarily reinstate Ms. Hemphill's employment as of the date of her original termination, February 18, 2015?

Yes or No?

If your response is yes, would your office be willing to remove any and all negative documentation on record regarding her prior employment, including the events surrounding her termination requiring the presence of base security by your office and the subsequent removal of Ms. Hemphill from the installation by base security?

Yes or no?

Based upon the actions that occurred during the termination involving base security, would your office be willing to ensure that Ms. Hemphill could regain unescorted security on and off the military installation in order to return to work as either a contract or government employee?

Yes or no?

Would your office be willing to re-hire Ms. Hemphill as a contract or government employee?

Yes or no?

If your response is yes, how soon would your office be willing to offer Ms. Hemphill re-employment?

Thank you for your attention to this matter.

Michelle Anthony[10]

On June 1, 2016, Walker replied to Anthony's email and corrected the notion that Walter Reed had any employer relationship with Hemphill at the time of her discharge. However, he omitted any discussion of the incident relating to Hemphill's removal from the facility on February 18, 2015 and the consequences thereof:

Good Morning Ms. Anthony,

WRNMMC's contacted your firm in February 2015 regarding Ms. Hemphill, was not a "firing" or "termination", but simply a directive to your firm that she not return to WRNMMC.

WRNMMC's association with Ms. Hemphill ended at that time, and we have no further comment regarding her tenure at WRNMMC.[11]

V. HEMPHILL'S SEARCH FOR WORK AFTER SHE WAS TERMINATED

Hemphill has a high school degree and earned 71 college credits. Prior to her employment by the Respondent in 2012, Hemphill had experience in clerical, secretarial and computer work. She does not possess a driver's license due to sight impairment, but is able to commute by public transportation from her home in Suitland, Maryland to locations within the District of Columbia metropolitan area. During her employment with the Respondent, Hemphill worked as a personnel assistant in Walter Reed's Medical Credentialing office. She was paid $18.16 per hour, plus $4.02 per hour in fringe benefits paid directly to her.

[10] Anthony's email, posing several hypothetical questions based on her version of the facts, was obviously calculated to elicit responses favorable to her defense to the unfair labor practices. She prefaced her interrogatories with a remark that Walker's response was voluntary, but then proceeded to insinuate that Walter Reed might face legal exposure requiring it to rehire Hemphill when it never had such a relationship with her.

[11] As previously noted, however, Judge Amchan rejected the Respondent's contention that Hemphill's discharge was based on a request by Walter Reed officials that she be terminated or otherwise removed from the facility prior to February 18, 2015. (R. Exh. 1; Tr. 570-73.) Similarly, the assertion in Walker's November 3, 2016 email to Heather Keough, the Region's compliance officer – that Walter Reed officials requested Hemphill's removal on *February 10, 2015* due to "[i]nappropriate outburst, reported by the government POC's" and "Sending personal email using government computer" – has already been rejected under the law of the case. (R. Exh. 2.)

After her termination on February 18, 2015, Hemphill filed for unemployment compensation benefits with the Maryland Division of Unemployment Insurance. Maryland requires those filing for unemployment insurance keep a record of their job search efforts. She was also instructed by Heather Keough, the Region's compliance officer, to record her job searches after filing charges. Hemphill's job search efforts were minimal. Utilizing job search websites, she submitted approximately 2 employment applications per week and recorded them on Board Form 5224.[12]

Hemphill's search efforts resulted in several interviews. On July 16, she received a conditional offer from Tai Pedro and Associates for a human resources assistant position at the United States Department of Justice, Tax Division. Hemphill signed the online form accepting the position, but Tai Pedro and Associates did not contact her thereafter.[13] She failed, however, to record this offer to either the Board or the State of Maryland.[14]

On July 16, Hemphill received another job opportunity in the form of an email from Kelly Services, Inc. (Kelly) scheduling an interview with for with another contractor, CGI Federal (CGI), for an administrative staff position at the Department of State's Passport Agency in Washington, D.C. She attended the interview on July 24, 2015, which resulted in an offer of employment on August 3. The wage rate offered was $16.50 per hour, plus a $4.02 fringe benefit payable by Kelly into a 401(k) savings account. The email also included Kelly's onboarding information. Hemphill electronically signed the employment agreement and the attached arbitration agreement.[15] She immediately received a welcome letter and completed the onboarding process. Hemphill subsequently changed her mind, however, and did not report to work for Kelly on August 10.[16]

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[12] Hemphill was evasive when asked why she failed to document all of her employment searches. Hemphill was also vague about how often and with whom she networked in trying to find employment. She "understood" that the Maryland unemployment office required her to search for two jobs per week and was "not under the impression" by the Board that she needed to search for every job. As such, I did not credit any of her testimony relating to alleged job searches beyond those listed on her NLRB and State of Maryland reporting forms. (GC Exh. 2-8; 282-291, 296-297, 300-302, 311-313, 410-415, 422, 431-437, 443, 451-458, 492.)

[13] Hemphill signed the offer; however the offer was contingent on Tai Pedro & Associates being awarded the contract and Hemphill passing a pre-employment evaluation. (Tra.750-754;R. Exh. 53)

[14] While there is insufficient evidence to refute Hemphill's testimony that she never heard back from Tai Pedro and Associates, her failure to report this offer diminished her credibility. (Tr. 752, 506-509, 753; R. Exh. 53.)

[15] The form, entitled, "Dispute Resolution and Mutual Agreement to Binding Arbitration," essentially bound Hemphill to arbitrate any employment and labor related claims against Kelly, excluding charges before the Board, the Department of Labor and the Equal Employment Opportunity Commission. However, the agreement precluded Hemphill from recovering monetary judgments from such charges and restricted the avenue for monetary relief to the arbitration process. (GC Exh. 18.)

[16] Hemphill also neglected to report the Kelly offer to the Board or the State of Maryland. Accordingly, I did not find credible her uncorroborated testimony that she (1) was initially offered a higher amount, (2) had a problem with the binding arbitration agreement, and (3) attempted unsuccessfully to retract her acceptance. (Tr. 195-196, 305-313, 425-429, 431-437, 440-441, 450, 453-454; GC Exh. 17-22; R. Exh. 3-4, 6, 18-22, 40.) In addition, I concur with the Respondent's contention that Hemphill's interpretation regarding the arbitration agreement suspiciously echoes the Region's

Hemphill pursued other job opportunities in September, with two of them resulting in job offers. On September 8, notwithstanding her abandonment of the job opportunity with CGI, Hemphill submitted an application directly to CGI for a secretarial position at the Department of Justice. CGI contacted her on September 24 and sent her applicable forms. Hemphill completed and returned the forms the same day. On or about September 28, she was interviewed for the position and was offered the position on October 1.[17] However, Hemphill failed to complete the applicable employee online processing, including signing the offer letter, and essentially abandoned the job opportunity as well. She also failed to report the CGI offer of employment to the Board or the State of Maryland.

Around the same the time, Hemphill was also in the process of applying to Aerotek for a financial analyst with the Department of Defense. She interviewed for the opening on September 28, but was never offered the position.[18]

On October 10, Hemphill applied to MacAuley-Brown Associates for a project acquisition analyst position with the Department of Homeland Security. She was offered the position on November 23, pending award of the contract to MacAuley. The contract award was delayed for several months, however, due to the resolution of a bid protest. By March 8, 2016, Hemphill completed the security clearance paperwork. She attended security interviews in June 2016 and received security clearance in September 2016. Hemphill began work on September 13, 2016.

LEGAL ANALYSIS

Judge Amchan's Order required the Respondent to offer Hemphill reinstatement to her position at Walter Reed or, if that position no longer existed, to a substantially equivalent position, as well as backpay for the period after she was unlawfully discharged on February 18, 2015. The Respondent, however, is unable to reinstate Hemphill to the Walter Reed or any other

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position in other cases regarding the legality of such agreements. (Tr. 312-313.) It is one thing for an employee to challenge a coercive term or condition of employment. It is not credible, however, for one to forego a job opportunity when she could challenge the legality of the provision any time after she is hired.

[17] I do not credit Hemphill's explanation that she abandoned this job opportunity because she thought that she had a job offer from Aerotek. (Tr. 460-463, 534-535; R. Exh. 51.) In her job search report to the State of Maryland on October 4, Hemphill misstated that the CGI position was "pending" when in fact it was offered to her on October 1. (GC Exh. 29 at 2.)

[18] Hemphill's testimony regarding Aerotek's alleged employment offer, as well as her vague explanation as to why the position did not materialize, was not credible. Curiously, she listed the CGI position as pending on her Maryland reporting form, when it had actually been offered to her. Yet, she listed the Aerotek position, for which there was no email confirmation of an offer of employment, as "hired." (GC Exhs. 4-5, 19A, and 29; Tr. 319-320, 462-463, 532, 536, 540-541, 548-549, 462-463, 532.) It begs credulity to suggest that Hemphill would be offered a position with a federal government contractor, scheduled for orientation and security clearance, and then have the job disappear because the process was going to take too long. First, there is no documentation from Aerotek to corroborate that claim. Second, there is an absence of explanation as to why Aerotek, in contrast to CGI, would not hire Hemphill pending completion of the security clearance process.

position since it no longer does business in the Washington, D.C. metropolitan area, leaving only the issue of the amount of appropriate backpay.

The burden is on the General Counsel to show the gross backpay due, that is, the amount of wages the discriminatee would have received but for the employer's illegal conduct." *J. H. Rutter Rex Mfg. Co. v. NLRB*, 473 F.2d 223, 230–231 (5th Cir. 1973), cert. denied 414 U.S. 822 (1973); *La Favorita, Inc.*, 313 NLRB 902 (1994). The General Counsel has discretion in selecting a formula that will closely approximate backpay and need only establish that the gross backpay amounts specified are reasonable and not an arbitrary approximation. *Performance Friction Corp.*, 335 NLRB 1117 (2001); *Mastell Trailer Corp.*, 273 NLRB 1190, 1190 (1984). Once established, it is the employer's burden to establish defenses to mitigate its backpay liability by demonstrating the willful loss of interim earnings to be deducted from gross backpay. *Basin Frozen Foods, Inc.*, 320 NLRB 1072 (1996).

The compliance specification is calculated based on Hemphill's hourly wage rate and health and welfare benefits with the Respondent. The compliance officer's calculations in the amended compliance specification are reasonable and not arbitrary. *Midwestern Personnel Services*, 346 NLRB 624, 631 (2006), enfd. 508 F.3d 418 (7th Cir. 2007).[19] The General Counsel having met this burden, the burden shifted to the Respondent to establish affirmative defenses mitigating its liability, including willful loss of earnings. *Millennium Maintenance & Electrical Contracting*, 344 NLRB 516, 517 (2004).

The Respondent contends that that Hemphill failed to mitigate damages on three possible occasions. The first is February 18 and is based on Hemphill's misconduct while being removed from the facility after she was unlawfully discharged. The second alleged cutoff date is May 31 when the Respondent lost the Walter Reed contract and terminated all of its employees. The third alleged cutoff date is August 10, when Hemphill turned down substantially equivalent employment from Kelly.

I. HEMPHILL'S CONDUCT ON FEBRUARY 18, 2015

The Respondent claims that Hemphill forfeited her right to reinstatement due to her misconduct while being removed from Walter Reed on February 18. Relying on the testimony of two Walter Reed officials, Fennewald and Walker, that they could recommend that a contractor not hire or retain a certain employee, the Respondent contends that Hemphill would have been barred from returning to Walter Reed.

At the outset, it must be noted that the issue of Hemphill's conduct on February 18 should have been litigated before Judge Amchan. The Respondent was charged in the underlying unfair labor practice proceeding with discriminatorily discharging Hemphill because she complained about wages and the complaint sought reinstatement and a make whole backpay remedy. The Respondent's defense denying such a claim also required it to demonstrate, among other factors, that Hemphill, by her conduct, forfeited her right to reinstatement. Such a defense would have reasonably included a claim that Walter Reed officials did not want Hemphill back.

[19] The General Counsel's motion to conform the pleadings to the proof, specifically Exhibit 2 to the second amended compliance specification, is granted.

Based on the Respondent's proffer that the evidence would show that Hemphill's misconduct would fall outside the sphere of relevance to the underlying proceeding, I denied the General Counsel's motion to preclude such proof.

Having considered the evidence as a whole, it is clear that Hemphill's conduct did not occur during the backpay period, but rather, during her last day of work for the Respondent. As such, it was part of the res gestae of the unlawful discharge and, as such, within the ambit of the controversy presented to Judge Amchan, whose decision provides the law of the case on the issue of Hemphill's right to reinstatement. *Fluor Daniel, Inc.*, 353 NLRB 133, 134 (2008) (Board precedent bars relitigation of issues in a compliance proceeding previously decided in underlying unfair labor practice proceeding), citing *Great Lakes Chemical Corp.,* 300 NLRB 1024, 1025 fn. 3 (1990), enfd. 967 F.2d 624 (D.C. Cir. 1992) (factual finding necessary to support judgment in a prior proceeding bars relitigation of issue in a subsequent proceeding involving the same parties).[20]

In any event, I did not find Walker's email response to Anthony's interrogatories, containing misleading statements implying legal exposure to Walter Reed as a result of Hemphill's unlawful discharge, as reliable evidence of the ability of the Respondent or the successor contractors to reinstate her to work at Walter Reed. His response also referred to Hemphill's conduct on February10, 2015, which is part and parcel of the proof presented to and rejected by Judge Amchan. Moreover, the two successor contractors during the backpay period confirmed the likelihood that Hemphill would have received offers of continued employment. Their assertions were corroborated by an Executive Order requiring successor contractors to offer the right of first refusal to displaced contract employees.

A popular refrain in business suggests that "the customer is always right."[21] However, even if a successor contractor placated a request by Walter Reed officials to bar Hemphill from the facility because of her conduct on February 18, such a scenario would not have freed the Respondent from its backpay obligations. Otherwise, the Respondent would benefit from its discriminatory discharge of Hemphill and heavy handed approach in forcibly removing her from the workplace. Accordingly, the Respondent failed to sustain this affirmative defense by a preponderance of the evidence.

II. THE RESPONDENT'S LOSS OF THE WALTER REED CONTRACT ON MAY 31

The Respondent contends that it is unlikely that Hemphill would have been hired by the successor contractors after its Walter Reed contract expired on May 31. It contends that the

[20] Assuming, *arguendo,* that evidence of Hemphill's at the time of her discharge is not deemed to have been fully and fairly litigated in the prior proceeding, it is clear that she became hostile and disruptive in the workplace while being removed from the Walter Reed on February 18, 2015. The protection of the Act, however, extends to brief emotional outbursts in the face of an unlawful discharge. *See Severance Tool Industries*, 301 NLRB 1166, 1170 (1991), enfd. 953 F.2d 1384 (6t h Cir. 1992) (employee did not lose protection of the Act by "disrespectful, rude, and defiant demeanor," including raised voice and vulgar language).

[21] The slogan was popularized by legendary retailer Harry Gordon Selfridge in 1909 and exhorted employees to highly prioritize customer satisfaction.

successor contractors were not required to rehire the predecessor's employees and relies on payroll records indicating that not all of the Respondent's employees were rehired after its contract expired. The Respondent also refers to testimony by Fennewald and Walker that they would not have recommended Hemphill for rehire based on her conduct while at the facility.

The credited evidence established, however, that the successor contractors offered employment to all of their predecessors' employees. Moreover, neither Fennewald nor Walker testified credibly that they have the authority to refrain from employing a particular individual, especially in light of an Executive Order requiring offers of first refusal to displaced federal contract employees. In Hemphill's case, she worked at Walter Reed under two previous contracts and was rehired each time.

Under the circumstances, the Respondent failed to establish by a preponderance of the evidence the unlikelihood that the successor contractors, in the absence of Hemphill's discharge, would not have hired her to continue working in the Medical Credentialing Department at Walter Reed beyond May 31. Accordingly, the backpay period does not end simply because the Respondent's Walter Reed contract concluded on that date.

III. HEMPHILL'S SEARCH FOR WORK

The Respondent's final defense asserts that Hemphill's backpay should be cutoff on several dates, including August 10, the date that she was supposed to start employment through Kelly with CGI at the Department of State, but failed to show up for work. The General Counsel offered numerous explanations for Hemphill's failure to accept that employment as well as several other positions offered to her or never materialized.

There is an abundance of evidence that interim employment was available in Hemphill's geographic area and that she undertook minimally acceptable efforts to find work – applying to approximately two employers per week. *D. L. Baker, Inc.*, 351 NLRB 515, 535 (2007) (discriminatee not required to spend 40 hours per week looking for employment). Nevertheless, that was enough to produce at least two job offers from CGI. Hemphill accepted the first one through Kelly for employment at the Department of State. The position was comparable to Hemphill's Walter Reed position, paying an hourly wage of $16.24 per hour, plus $4.02 in fringe benefits into a 401(k) savings account. Hemphill was supposed to start on August 10, but never reported to work. Nearly two months later, on October 1, Hemphill received an employment offer for another suitable administrative position directly with CGI at the Department of Justice. Inexplicably, she failed to complete the onboarding process and bypassed that position too. Her contrived excuses in attributing her rejection of the first opportunity for employment at an hourly rate of $1.91 less per hour and a binding arbitration agreement hardly reflected a reasonable response by a person unemployed for nearly 6 months at the time. See *The Lorge* School, 355 NLRB 558, 560 (2010) (requiring "a good faith effort consistent with an inclination to work and be self-supporting.") Accordingly, both instances reflect a willful refusal by Hemphill to mitigate her backpay liability by accepting suitable interim employment. *St. George Warehouse*, 351 NLRB 961, 964 (2007).

Since Hemphill declined her initial opportunity to mitigate on August 10, backpay is tolled for the remainder of the backpay period. Id. at 963. Accordingly, I have reduced her gross backpay from $74,971.68 to $21,366.60, reduced fringe benefits from $13,056.96 to $4,068.24, leave intact the calculation of $1,016.40 for paid time off due, and exclude job search expenses accrued during the tolled period. The gross backpay and fringe benefits awarded are based on the amounts listed for 2015 calendar quarters 1 and 2, and half of 2015 calendar quarter 3 (July 1 through approximately mid-August).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

SUPPLEMENTAL ORDER

The Respondent, Anthony & Associates, Inc., Marietta, Georgia, its officers, agents, successors, and assigns, shall, consistent with the compliance specification as modified by the foregoing findings, satisfy its obligation to make whole Phyllis A. Hemphill by paying her backpay in the amount of $26,451.24, plus compensation for the adverse tax consequences, if any, of receiving a lump-sum backpay award, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), minus tax withholdings required by Federal and State laws.

Dated, Washington, D.C. August 18, 2017

Michael A. Rosas
Administrative Law Judge

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.